No. 08-804

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LOU ANNE LAVENDER PERKINS,

Petitioner,

v.

DCC LITIGATION FACILITY, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

ROBERT D. GOLDSTEIN P38298
TIMOTHY J. JORDAN P46098
Counsel of Record
GARAN LUCOW MILLER, P.C.
8332 Office Park Drive
Grand Blanc, Michigan 48439
810-695-3700
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner has presented compelling reasons as identified by Sup. Ct. R. 10(a) to grant the Petition, given the Sixth Circuit's analysis of the evidence and opinion affirming the District Court's exercise of proper discretion in denying Petitioner's motion to opt-out of the Settlement Facility in reference to her breast implant claim where the District Court found that Petitioner showed no excusable neglect in failing to opt-out by the deadline date of November 29, 2004, and where Petitioner acknowledged in the Sixth Circuit her "misguided actions" in regard to her failure to opt-out primarily involving claimed reliance on her attorneys?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, DCC Litigation Facility, Inc. is a wholly owned subsidiary of the Dow Corning Corporation. Dow Corning Corporation is 50% owned by publicly held Corning, Inc. and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of the publicly held Dow Chemical Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Statement of Facts	3
C. Litigation Background	6
REASONS FOR DENYING THE PETITION	11
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Burns v. Elrod, 752 F.2d 151 (7th Cir. 1985) 13

Graphic Commc'ns Int'l Union v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001) 15

Hosp. del Maestro v. Nat'l Labor Relations Bd., 263 F.3d 173 (1st Cir. 2001) 16

In re Agway, Inc., 313 B.R. 31 (Bankr. N.D.N.Y. 2004) 19

In re A.H. Robins Co., Inc., 219 B.R. 153 (E.D. Va. 1998), aff'd, 164 F.3d 623 (1998) 20

In re Am. Classic Voyages Co., 405 F.3d 127 (3d Cir. 2005) 15, 19

In re Cable and Wireless, USA, Inc., 338 B.R. 609 (Bankr. D. Del. 2006) 18

In re Eagle-Picher Indus., Inc., 131 F.3d 1185 (6th Cir. 1997) 15

In re Eagle-Picher Indus., Inc., 158 B.R. 713 (Bankr. S.D. Ohio 1993) 16

In re Enron Corp., 419 F.3d 115 (2d Cir. 2005) 14, 15, 19, 20

In re G.A.D., Inc., 340 F.3d 331 (6th Cir. 2003) 18

In re Kmart Corp., 381 F.3d 709 (7th Cir. 2004) 16, 19

In re Spiegel, Inc., 337 B.R. 816 (Bankr. S.D.N.Y. 2006) 19

TABLE OF AUTHORITIES – Continued

Page

Jones v. Chemetron Corp., 212 F.3d 199 (3rd Cir. 2000) 15

Logan v. Dayton Hudson Corp., 865 F.2d 789 (6th Cir. 1988) 14

McCurry v. Adventist Health Sys./Sunbelt, Inc., 298 F.3d 586 (6th Cir. 2002) 17

McNeil v. United States, 508 U.S. 106 (1993) 18

Mulane v. Hanover Bank & Trust Co., 339 U.S. 306 (1950) 20, 21

Nicholson v. City of Warren, 467 F.3d 525 (6th Cir. 2006) 18

Pelican Product Corp. v. Marino, 893 F.2d 1143 (10th Cir. 1990) 15

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 1123 L.Ed.2d 74 (1993) ..... *passim*

Schroeder v. City of New York, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962) 21, 22

Tancredi v. Metro. Life Ins. Co., 378 F.3d 220 (2d Cir. 2004) 16

US v. Torres, 372 F.3d 1159 (10th Cir. 2004) 16

STATUTES/COURT RULES/OTHER AUTHORITY

Bankruptcy Rule 9006(b)(1) 14, 15

Federal Rule of Civil Procedure 60(b) 14, 15

Sup. Ct. R. 10 22

STATEMENT OF THE CASE

A. Nature of the Case

This action arises out of the Chapter 11 Bankruptcy filed by Dow Corning Corporation ("Dow Corning") and from the breast implant mass tort which precipitated its filing. Petitioner Lou Anne Lavender Perkins ("Perkins") is one of more than 100,000 women who filed Proofs of Claim in the bankruptcy case seeking compensation for personal injuries allegedly resulting from their use of silicone breast implants.

Dow Corning emerged from bankruptcy on June 1, 2004 when its Amended Joint Plan of Reorganization ("the Plan") became effective. The centerpiece of the Plan is a breast implant settlement program which offers a variety of fixed monetary benefits to claimants without the necessity of proving many of the required elements of a product liability action such as a product defect or a causal connection between use of the product and a medical condition. The Plan created an independent claims operation known as the Settlement Facility – Dow Corning Trust ("SFDCT") to administer the settlement. SFDCT is run by a claims administrator and, ultimately, overseen by the District Court. To those claimants who prefer to pursue their claims through traditional litigation, the Plan created another entity, DCC Litigation Facility, Inc. ("the Litigation Facility"), a wholly-owned subsidiary of reorganized Dow Corning, to be the defendant in suits brought

by such claimants who formally indicate their intention of doing so by filing a "Participation Form" with SFDCT no later than 180 days from the Plan effective date or November 29, 2004. Perkins failed to file a Participation Form by that deadline, or at all, and brought the present lawsuit seeking leave to bring suit against the Litigation Facility notwithstanding her failure to satisfy that prerequisite under the clear provisions of the Plan.

In an opinion filed on March 31, 2007, the District Court found that, well in advance of the opt-out deadline, SFDCT had mailed the required participation form packet both to Perkins's attorney of record at that time and to Perkins herself at her last-known address. Both mailings came back as undeliverable. The District Court further found that Perkins and her initial counsel had a duty to update SFDCT with their current addresses and their failure to do so did not constitute excusable neglect which might justify an extension of the opt-out deadline. Accordingly, the District Court denied Perkins' motion for leave to bring suit against the Litigation Facility but leaving her free to pursue a claim under the settlement program.

Perkins appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit which, in an opinion dated July 18, 2008, affirmed the District Court. On appeal to the Sixth Circuit, Petitioner argued, as she does in this Court, that the lower court erred in not allowing her the late opt-out from the Settlement Facility based on

excusable neglect. The Court of Appeals, however, agreed with the District Court finding no excusable neglect and concluded that the plain and ordinary meaning of the work "must," as set forth in the Plan, requires claimants to affirmatively elect to litigate and to complete and return the form by the election deadline which is a mandatory, and not a discretionary, requirement. (Writ Appendix A-2 through A-3.) The Sixth Circuit then stated that it agreed with the District Court and adopted its "well reasoned opinion and order," affirming the judgment of the District Court. (Writ Appendix A-3.)[1]

B. Statement of Facts

Before setting out the evidence in the record relevant to Petitioner's argument in her writ, it is necessary for respondent to observe that Petitioner's statement of the case contains misstatements and omissions as to the facts on the record before the lower courts. Also, Petitioner's argument in her writ contains unsubstantiated factual allegations that are simply wrong. For example, her claim that the opt-out deadline changed is untrue as the Plan itself set it 180 days from the effective date which never change. In addition, Petitioner's claims of the SFDCT

---

[1] Because the District Court's Opinion was adopted as the opinion of the Sixth Circuit, but not included in the Petitioner's Appendix, Respondent has provided that opinion and order in its Appendix.

being in "disarray" and behind 50,000 claims in payment is simply unsubstantiated and untrue.

On June 9, 2006, Perkins filed "a Motion to File Notice of Intent to Opt-Out of the Settlement," and the District Court exercised its jurisdiction under the Plan to interpret and enforce the Plan's terms. Plan, Art. 8.7.3 and Art. 8.7.8. (R 1, Motion to File Notice of Intent; R 9, Order Denying Motion/Appeal to File Notice of Intent, pp. 4-5, APP pp. 4-5).[2]

Perkins claimed that she never received a form to opt-out of the settlement program nor any information regarding the deadline. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 1, APP p. 1). In her initial letter of appeal dated February 2, 2005, Petitioner stated that on September 10, 2003, she sent an e-mail to the "Dow Corning Tort Committee" which included her name, current address, telephone number and diagnosis. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 1, APP p. 1).[3] The email at issue was never sent to the

---

[2] According to the Plan documents, *all* personal injury claimants who declined participation in the settlement program, except Class 8 claimants, were required to return to the Settlement Facility – Dow Corning Trust ("SFDCT") a completed participation form by November 29, 2004. Perkins is identified as a Class 5 claimant, meaning a domestic breast implant personal injury claim.

[3] Petitioner's reference to the "Dow Corning Tort Committee" is in reality the Official Committee of Tort Creditors which consisted of Plaintiffs' attorneys and is independent of both Dow Corning and SFDCT.

Settlement Facility, but to an address identified as "info@tortcomm.org." (R 9, Order Denying Motion/ Appeal to File Notice of Intent, p. 1, APP p. 1). Petitioner never contacted the SFDCT until 2005, well after the opt-out deadline. *Id.*

The claims administrator for the Settlement Facility, David Austern, in a 6/27/06 correspondence, stated that Perkins' original claim form packet was mailed in early 2003 to her attorney's last known address. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). The packet, however, was returned "undeliverable" by the Postal Service. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). On July 17, 2004, the Settlement Facility also mailed to Ms. Perkins's last known address a Class 5 Claim Packet and a Participation Form. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 7). Again, the packet was returned "undeliverable" in September 2004. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

In February 2005, Perkins called the Settlement Facility. At that time, she gave the Settlement Facility her new address but made no inquiries about opting out. (R 5, Response to Motion to File Notice of Intent, p. 2; R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

In June 2005, the Settlement Facility received notice that the law firm of Feldman, Franded, Woodard, Farris and Boudreaux was representing

Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3). On July 28, 2005, the Settlement Facility received another notice advising the Facility that the firm was no longer representing Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3).

On September 13, 2005, Ms. Perkins provided the Settlement Facility with yet another address which was different from the addresses noted on the District Court's correspondences to Ms. Perkins. (R 9, Order Denying Motion/Appeal to File Notice of Intent, p. 3, APP p. 3.)

It is undisputed that Perkins has never filed a claim form with the Settlement Facility. (R 5, Response to Motion to File Notice of Intent, p. 2; R 9, Opinion and Order Denying Motion/Appeal to File Notice, pp. 3-4, APP pp. 3-4; and Petitioner's Sixth Circuit Appeal Brief, pp. 13, 15.)[4]

C. Litigation Background.

In Petitioner's initial letter of appeal of *February 18, 2005*, she wished to opt-out of the settlement program. The District Court exercised its jurisdiction

---

[4] Perkins admitted that she had not filled out a Class 5 claim form and would not file a form maintaining that her attorneys advised her that she did not have to complete a Class 5 Claim packet to opt-out of the Settlement Facility. (R 7, Reply to Response to Letter to all Parties, pp. 1-2; and R 9, Order Denying Motion/Appeal to File Notice, p. 4, APP p. 4).

under the Plan to interpret and enforce the Plan's terms. (R 9, Opinion Denying Motion/Appeal, pp. 1, 4, APP pp. 1, 4). The basis of Perkins' claim was that she never received any form to opt-out of the settlement program, nor any information regarding the deadline. Essentially, Ms. Perkins was claiming excusable neglect because of her reliance on her attorneys, and that she had demonstrated her intent to opt-out of the settlement program based on various correspondence dated February 24, 2005, March 24, 2005, July 22, 2005, and July 28, 2005 (all past the participation form filing deadline of November 29, 2004), which chronicled her history of why she did not file a participation form. (R 9, Order Denying Motion to Appeal, p. 2, APP p. 2).[5]

In response to Ms. Perkins' motion to opt-out, the Litigation Facility noted that plaintiff admitted that she had never filed any participation form, much less a participation form on or before November 29, 2004. Therefore, she could not pursue an action against the Litigation Facility. (R 5, Response to Motion to File Notice of Intent, p. 2).

On March 31, 2007, the District Court, by the Honorable Denise Page Hood, issued a memorandum

---

[5] Perkins acknowledged in the Sixth Circuit that she "may have taken some missteps in her attempts to protect her rights, [but] there can be no question that she manifested her election to litigate against the Litigation Facility and at no time demonstrated any inclination to accept the Settlement Facility resolution." (Petitioner's Sixth Circuit Appeal Brief, pp. 10-11.)

opinion and order denying Petitioner's Motion/Appeal to File Notice of Intent to Opt-Out. The Court found that excusable neglect was absent:

> However, as to Ms. Perkins failure to submit a timely Participation Form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the Plan and the Plan Documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect. The Settlement Facility mailed the forms to the addresses available to the Facility. *Ms. Perkins and her initial counsel had the duty to update the Settlement Facility with their current addresses.* [Italics added.] Ms. Perkins had the knowledge on September 10, 2003 to request information from the then-Tort Claimants Committee, after receiving the information from the Alexander Law Firm. It was not until February 2005, over a year later, that Ms. Perkins decided to contact the Settlement Facility. Ms. Perkins does not indicate how she learned of the Settlement Facility's telephone number. Based on Ms. Perkins letters, she had the opportunity to speak to various attorneys regarding her claim, including hiring a lawyer in June 2005. Ms. Perkins refers to the Alexander Law Firm in September 2003, Mr. Boudreaux in June 2005, Ms. Read in 2005 and Ms. Johnston of Toxic Discovery. There

> is no indication that Ms. Perkins or her initial counsel relied on misinformation provided by the Debtor or the Bankruptcy Court or the Settlement Facility prior to the November 29, 2004 Election Deadline. Although Ms. Perkins never received the Participation Form, it was not because she was intentionally deprived of receiving the Form. The Settlement Facility's records indicate the Packet was sent to her attorney of record and to Ms. Perkins herself but both were returned undeliverable. The Settlement Facility was not provided with the current addresses of both Ms. Perkins and her attorney of record See, e.g., *In re Isaacman*, 26 F.3d 629,636 (6th Cir. 1994); *In re Halstead*, 158 B.R. 485,487 (9th Cir. B.A.P. 1993), aff'd, 53 F.3d 253 (9th Cir. 1995). Unless the action of the moving party has been delayed by an outside force, there will generally be no cause to apply equitable tolling principles. *In the Matter of Hambright*, 216 B.R. 781, 783 (W.D. Mich. 1997). Ms. Perkins Claim must remain in the Settlement Program. However, Ms. Perkins must submit the appropriate forms to the Settlement Facility in order for her Claim to be processed. Ms. Perkins may refer to the Settlement Facility's website (www.sfdct.com) for further information and deadlines governing her Class 5 Claim.

(R 9, Opinion, pp. 8-9, APP pp. 8-9).

On April 19, 2007, the memorandum opinion and order was sent to Ms. Perkins. On May 1, 2007, Perkins filed a motion for reconsideration of the March 31, 2007, order. (R 10, Certificate of Service of Order and R 12, Motion for Reconsideration).

On May 1, 2007, plaintiff also filed her notice of appeal to the Sixth Circuit. (R 13, Notice of Appeal, pp. 1-6).

On May 3, 2007, plaintiff filed a second motion for reconsideration of the March 31, 2007, Order. (R 15, Motion for Reconsideration, pp. 1-2).

On February 28, 2008, the District Court denied both motions for reconsideration because Perkins demonstrated no palpable defect by which the Court and parties were misled nor had she shown that a different disposition of the case should result from the correction of any error. (See Writ Appendix, A-4 through A-6.)

After full briefing and oral argument, the Sixth Circuit Court of Appeals issued its opinion on July 18, 2008, affirming the judgment of the District Court and adopting its "well-reasoned opinion and order." (See Writ Appendix, A-1 through A-3.)

REASONS FOR DENYING THE PETITION

I. Where Petitioner Never Filed the Court-mandated Participation Form to Opt-Out of the Settlement Facility in Reference to Her Breast Implant Claim by the Filing Deadline of November 29, 2004, and Where Plaintiff Acknowledged in the Sixth Circuit "Misguided Actions" on Her Part in Regard to Her Failure to Opt-Out Primarily Involving Her Claimed Reliance on Her Attorneys, the Sixth Circuit Correctly Affirmed the Judgment of the District Court Denying Petitioner's Untimely Request to Opt-Out Where the Trial Court Exercised Proper Discretion in Denying Petitioner's Motion to Opt-Out Finding That She Showed No Excusable Neglect.

A. Petitioner Fails to Present Any Conflict in the Trial Court Decision or the Decision of the Court of Appeals and Has Not Met Her Burden of Demonstrating Compelling Reasons for the Petition to Be Granted.

Petitioner argues the Sixth Circuit "erred by affirming the entry of judgment denying Perkins's motion to opt-out of the Settlement Facility after the opt-out deadline had lapsed" maintaining that the 6th Circuit judgment "ignores the excusable neglect resulting in Perkins' failure to timely opt-out." Writ, pp. i and 5.

Petitioner's argument fails for the very reason that the Sixth Circuit, in adopting the District Court's opinion, found there was no excusable neglect on the part of Petitioner in failing to timely opt-out. As explicitly stated in the District Court opinion, "[A]s to Ms. Perkins' failure to submit a timely participation form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the plan and the plan documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect." (R 9, Order Denying Motion/Appeal to File Notice of Intent to Opt-Out, p. 6, APP p. 6).

In her attempt to deflect the court's attention from the finding of no excusable neglect, Petitioner falsely states that she was told by the SFDCT that it was in total disarray, was 50,000 claims behind, had not paid claims in two years, and its current administrator was being forced to step down. (See Writ, p. 2.) In truth, Petitioner attributed such unsubstantiated claims to third parties, not the SFDCT, as set forth in her correspondence to the trial court (correspondence which was treated as Perkins' motion to opt-out).

Setting aside the fact the SFDCT never made such statements and to the extent they are claimed, they are unsubstantiated, and Petitioner never argued the alleged "disarray" as a basis for a finding of "excusable neglect."

Further, Petitioner claims the Settlement Facility did not have her correct address until after the November 29, 2004, deadline to opt-out. Petitioner fails to acknowledge, however, that it was the responsibility of the Petitioner, not the Settlement Facility, to provide correct addresses in regard to further proceedings in the Settlement Facility.

Petitioner also claims that the writ should be granted because she did not receive the required forms and documentation prior to the deadline to opt-out of a class and that it was totally beyond Perkins' knowledge that the Settlement Facility was in "total disarray." Nonetheless, that is not what the record below reflects. Rather, the record reflects that it was the Petitioner who had the responsibility to update the Facility and who failed to provide the correct address to the Facility. Moreover, as Petitioner claims in her other reason for granting the writ, it was her attorneys "failure to update her address" which Petitioner "is now being held accountable for." Under these circumstances, plaintiff's own "reasons for granting the writ" actually compel that the Writ be denied.

In any event, the Sixth Circuit affirmance of the District Court's decision is correct because the District Court did not exercise an abuse of discretion in denying the untimely request to opt-out.[6]

---

[6] Under these circumstances, denial of a late claim is reviewed on an abuse of discretion standard. *Burns v. Elrod*, 752 F.2d 151, 154 (7th Cir. 1985). An abuse of discretion is present

(Continued on following page)

While Petitioner claims that failure to file the participation opt-out form constitutes "excusable neglect," she fails to discuss the applicable test for excusable neglect and whether it applies under the circumstances of this matter. After reviewing the test and applying it to this case, it is evident that the District Court exercised proper discretion in denying plaintiff's motion to opt-out of the Settlement Facility.

The Plan and its opt-out deadline date to litigate claims against the Litigation Facility arose out of a bankruptcy reorganization of Dow Corning Corporation.[7]

Bankruptcy Rule 9006(b)(1) permits a court to allow claims filed after a court ordered bar date if the failure to timely file was the result of "excusable neglect." The "burden of proving excusable neglect lies with the late-claimant." *In re Enron Corp.*, 419

---

only if the appellate court has a definite and firm conviction that the District Court committed a clear error of judgment. *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1988).

[7] As the bankruptcy court-imposed deadline for filing participation opt-out forms was November 29, 2004, FRCP 60(b) provides that excusable neglect will relieve a party from a judgment but such a motion based on excusable neglect must be filed within a year from the date of the judgment. In this matter, the deadline for filing was November 29, 2004, but Petitioner still has not filed a participation form to opt-out of Settlement Facility. Moreover, Petitioner did not file her motion to file notice of intent to opt-out until June 9, 2006. (R 1, Motion to File Notice of Intent by Plaintiff.)

F.3d 115, 121 (2d Cir. 2005); *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3rd Cir. 2000); and *Pelican Product Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 1123 L.Ed.2d 74 (1993), this Court examined the definitions of excusable neglect in Federal Rule of Civil Procedure 60(b) as guideposts, since it found that Bankrupty Rule 9006(b)(1) was "patterned after Rule 60(b)" of the Federal Rules. *Pioneer*, 507 U.S. at 391, 113 S.Ct. at 1496. This Court found that the inquiry into whether the neglect is excusable "is at bottom an equitable one, taking account of all the relevant circumstances surrounding the party's omission." *Id.* at 395, 113 S.Ct. at 1498. This Court then listed several factors to be considered in the equitable inquiry, including "(1) the danger of prejudice to the debtor; (2) length of the delay and its potential impact on the proceedings; (3) the reason for the delay; (4) whether the delay was within the reasonable control of the late party; and (5) whether the late party acted in good faith." *In re Eagle-Picher Indus., Inc.*, 131 F.3d 1185, 1188 (6th Cir. 1997).

The factors of the *Pioneer* test "do not carry equal weight; the excuse given for the late filing must have the greatest import." *Graphic Commc'ns Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) (quotation omitted); accord *In re Enron Corp.*, 419 F.3d 115, 122-23 (2d Cir. 2005); *In re Am. Classic Voyages Co.*, 405 F.3d 127, 134 (3d Cir. 2005)

("We rely primarily on the third *Pioneer* factor," the reason for the delay); *In re Kmart Corp.*, 381 F.3d 709, 714-15 (7th Cir. 2004).

Courts have found that if the late claimant's reason for delay is insufficient, excusable neglect will not be found even if the other factors favor the claimant. *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 228 (2d Cir. 2004) (absent sufficient reason for delay, minimal delay and prejudice will not constitute excusable neglect); *US v. Torres*, 372 F.3d 1159, 1162-63 (10th Cir. 2004) (no excusable neglect when reason for delay was confusion over deadline, even though all other *Pioneer* factors favored claimant); *Hosp. del Maestro v. Nat'l Labor Relations Bd.*, 263 F.3d 173, 175 (1st Cir. 2001) (unjustified failure to comply with plain, unambiguous deadline in notice is not excusable neglect despite only 1-day delay, little danger of prejudice, no negative impact on proceedings, and claimant's good faith); *In re Eagle-Picher Indus., Inc.*, 158 B.R. 713, 716 (Bankr. S.D. Ohio 1993) (lack of valid excuse and ample notice of bar date outweigh absence of prejudice or adverse effect on administration).

Petitioner's newest reason for excusable neglect, raised for the first time in her Writ, is that claimants were categorized "differently" and the opt-out deadline "has undergone a number of revisions and changes." (Writ, p. 5.) As for the later excuse, there is no evidence in the record substantiating this new allegation. Concerning the former excuse, Petitioner never argued that the different categories of claimants somehow constitutes a reason for excusable

neglect. Nor does Petitioner articulate how the different categories of claimants resulted in her being unable to file a timely opt-out form.

Petitioner, however, misperceives the nature of what constitutes excusable neglect. Besides, the prejudice that would be visited on the Litigation Facility if such an untimely claim (and more to the point, one where no participation form was ever filed) were allowed to proceed would be substantial.

First, Petitioner cites no case in support of her argument that consulting with various counsel and her "conduct" constitutes excusable neglect. (Petitioner, Writ, p. 5.) In fact, the contrary is true. Reliance on the advice of counsel, even if that was the reason for Perkins not filing the participation form, is not evidence of excusable neglect. Perkins is responsible for her choice of counsel, and her choice to follow counsel's advice. This Court has noted that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co.,* 507 U.S. at 396, 113 S.Ct. at 1496. The Sixth Circuit observed that it may be excusable for a client to rely on the advice of counsel, but failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect. *McCurry v. Adventist Health Sys./Sunbelt, Inc.,* 298 F.3d 586, 595 (6th Cir. 2002).

To the extent that Petitioner is claiming that she was proceeding without representation at various points, this is insufficient to constitute excusable neglect.

Perkins's failure to read or comprehend the Plan does not support a finding of excusable neglect, even if she was unrepresented. See *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested procedural rules . . . should be interpreted so as to excuse mistakes by those who proceed without counsel."), cited in *In re G.A.D., Inc.*, 340 F.3d 331, 335 (6th Cir. 2003) and *Nicholson v. City of Warren*, 467 F.3d 525, 527 (6th Cir. 2006). Perkins' wish to opt-out after the deadline is not transformed into excusable neglect simply because she chose not to have counsel fill out her participation form.

Accordingly, under the *Pioneer* factors, the reason for delay, Factor No. 3, and whether Perkins's omission was within her reasonable control, Factor No. 4, do not support excusable neglect. Given that the excuse itself for not filing the Participation Form is generally considered to have the greatest import, Perkins fails to meet this overriding requirement under the *Pioneer* factors.

Regarding Petitioner's claim that there is no danger of prejudice to the Respondent for allowance of Perkins' late claim, this would open the floodgates to the Litigation Facility if all other similarity situated claimants like the Petitioner were allowed to proceed.

First, the party seeking to file a late claim carries the burden of proving the lack of prejudice to the debtor. *In re Cable and Wireless, USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006). Petitioner has failed

to carry her burden of proving a lack of prejudice to the Litigation Facility.

Courts consistently find impermissible prejudice when the allowance of one late claim would "open the floodgates" to other similar late claims. *Am. Classic Voyages*, 405 F.3d at 133-34 (due to large volume of late claim requests filed and continuing inquiries from other late claimants, allowing one late claim could render bar date meaningless); *Kmart*, 381 F.3d at 713-14 (allowing relatively small late claim could induce other late claimants to seek admission based on a "simple 'innocent mistake'" and open the door to "a mountain of such claims with a corresponding price tag in the millions of dollars"); *In re Spiegel, Inc.*, 337 B.R. 816, 820 (Bankr. S.D.N.Y. 2006) ("To allow claims filed by parties at the late date of confirmation would wreak havoc with the entire Plan negotiation process. Allowing the Amended Claims could also adversely affect the estate by opening the floodgates to similar claims in a case where over 4,300 claims have been filed."); *In re Agway, Inc.*, 313 B.R. 31, 45 (Bankr. N.D.N.Y. 2004) (allowing late claims "would open the door to other late claimants in the case, which would . . . prejudice the debtors by requiring them to expend time and counsel fees objecting to these motions").

As in *Enron*, the Settlement Facility involves thousands of potential late claimants. Perkins is not "only one" late-filed claim – the allowance of her to file late claim will serve as a green light to a flood of other potential litigants seeking to opt-out after the

deadline. See *Enron*, 419 F.3d at 130 (quoting *Kmart*, 381 F.3d at 714) (finding the "more relevant inquiry is whether allowing one such claim would lead to 'a mountain of such claims, . . . which the bankruptcy court, having admitted the first claim, would be hard pressed to reject.'") *In re A.H. Robins Co., Inc.*, 219 B.R. 153, 158 (E.D. Va. 1998), aff'd, 164 F.3d 623 (1998) ("allowing any of the over 106,000 disallowed claimants to revive a claim upon the mere assertion of compliance with the deadline or nonreceipt of the necessary forms would have so diluted the excusable neglect requirement in 1989 to 1991 as to open the floodgates to additional claims to payment from the limited Trust fund. The prejudice to the Trust and to each of the 200,000 claimants who had complied with all the deadlines to perfect their claims would have been considerable then as well.").

Significantly, the complete lack of specificity and ever-changing excuses in Perkins' claims for her untimely opt-out means that if the Court granted Perkins motion, it would have no reason to refuse any other untimely opt-out.

Therefore, the first *Pioneer* factor also favors the Litigation Facility.

Finally, Petitioner now argues that she was denied "procedural due process . . . contrary to fundamental notions of fairness. See *Mulane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)." Writ, p. 6. Petitioner, however, fails to articulate exactly what procedural due process was denied. The fact that she

was barred from opting out of the Settlement Facility because she failed to timely opt-out is not a denial of procedural due process as reflected in the various cases cited in this brief declining to allow a late claim. In fact, the *Mulane* decision cited by Petitioner actually supports the lower courts' decisions. *Mulane* held that in an action similar to this, actual notice is not required by due process. *Mulane* involved a judicial settlement of accounts by the trustee of a common trust fund established under New York banking law involving statutory notice by newspaper publication to beneficiaries of the trust. In addressing the issue of due process, this Court stated:

> [A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314, 70 S.Ct. at 657 (italics added). This language certainly implies that actual receipt of notice is not required by due process, as long as the notice sent was "reasonably certain to inform those affected or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* at 315, 70 S.Ct. at 658; *Schroeder v. City of New York*, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), where the Court noted that the defendant city was "constitutionally obliged to make at least a good faith effort to give personally to the

appellant [notice of the right to be heard] – an obligation which the mailing of a single letter would have discharged." *Id.* at 83 S.Ct. 283.

In sum, given the application of the most important *Pioneer* factors to this matter, the District Court exercised proper discretion in denying Petitioner's motion to opt-out of the Settlement Facility and the Sixth Circuit correctly affirmed the judgment.

Petitioner, therefore, has not met her burden pursuant to Sup. Ct. R. 10 demonstrating any "compelling reasons" for the petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

DATED:
January 16, 2009

GARAN LUCOW MILLER, P.C.
ROBERT D. GOLDSTEIN P38298
TIMOTHY J. JORDAN P46098
Attorneys for Respondent
DCC Litigation Facility, Incorporated
8332 Office Park Drive
Grand Blanc, Michigan 48439
810-695-3700

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

DOW CORNING CORPORATION,

Reorganized Debtor.

Lou Anne Lavender Perkins,

v.

DCC Litigation Facility Incorporated. /

Civil Action No. 06-CV-12558-DT
Honorable Denise Page Hood

MEMORANDUM OPINION AND ORDER

(Filed Mar. 31, 2007)

I. BACKGROUND

This matter is before the Court on Lou Anne Lavender Perkins' Letters/Appeal to Opt-Out from the Settlement Facility-Dow Corning Trust ("Settlement Facility"). Ms. Perkins claims she never received a form to opt out of the Settlement Program nor any information regarding the deadline.

In her initial letter of appeal dated February 18, 2005, Ms. Perkins indicated that on September 10, 2003, she sent an e-mail to the Settlement Facility which included her name, current address, telephone number and diagnosis. (2/18/05 Letter/Appeal) However, a review of the e-mail indicates that the e-mail

was sent to the then-Tort Claimants' Committee e-mail address at "info@tortcomm.org." (Ex to 2/18/05 Letter/Appeal) On February 4, 2005, Ms. Perkins spoke with Annie O'Brien from the Settlement Facility who indicated that the Facility did not have information as to whether Ms. Perkins opted-out of or opted-in to the Settlement Program and that information from her counsel was returned in February 2003. Ms. Perkins indicated to Ms. O'Brien that she had updated her information in September 2003 but was told by Ms. O'Brien that they did not accept e-mails. Ms. Perkins indicated to Ms. O'Brien that the e-mail did not come back to her as undelivered and that Kathy Johnson with Toxic Discovery sends the Settlement Facility e-mails all the time. Ms. O'Brien referred Ms. Perkins to the Multi District Litigation Facility ("MDL").

Ms. Perkins thereafter called the MDL and spoke with Sandra Townsend who told her that her records had been sent to the Settlement Facility two years earlier. Ms. Townsend was able to confirm Ms. Perkins' catalog and lot numbers to her Dow Corning implants. Ms. Townsend advised Ms. Perkins to call the Settlement Facility again.

Ms. Perkins called the Settlement Facility again and this time spoke to John who confirmed her SID number, her Class 5 Claimant status and an incorrect address. John told Ms. Perkins that if she wanted to change her address or attorney on the record, she had to do so in writing. Ms. Perkins told John that she wanted to op-out but he told her the deadline was

November 29, 2004. John indicated to Ms. Perkins that if she wanted to opt-out, Ms. Perkins had to write a letter before February 28, 2005 and to send the letter to the Court address. Ms. Perkins received a Claimant Information Update Request form from John. She indicated she had filled out the form and was mailing the form back to the Settlement Facility. Ms. Perkins also prepared a letter requesting a Class 5 Claim packet to send to the Settlement Facility. Ms. Perkins requests that she be allowed to opt-out of the Settlement Facility. (2/18/05 Letter/Appeal)

Ms. Perkins' subsequent letters to the Court dated February 24, 2005, March 17, 2005, March 24, 2005, July 22, 2005 and July 28, 2005, indicate that she wishes to opt-out from the Settlement Facility. Ms. Perkins engaged Paul Boudreaux's services as counsel on May 14, 2005. Mr. Boudreaux apparently filed a lawsuit on behalf of Ms. Perkins lawsuit against Dow Corning, Dow Chemical, Corning Corporation and Dr. Frederick Martin in Tulsa County District Court, State of Oklahoma. (7/22/05, 7/28/05 and 9/13/05 Letters) Ms. Perkins in her letters indicated that Dow Corning's lawyers threatened to seek sanctions against Ms. Perkins and her then-counsel, Paul Boudreaux, for filing the lawsuit. In June 2005, Mr. Boudreaux submitted an Order dismissing the lawsuit. (Ex. to 7/28/05 Letter) Mr. Boudreaux withdrew from representing Ms. Perkins in the lawsuit and from the matters before the Settlement Facility. (Ex. to 9/13/05 Letter)

David Austern, Claims Administrator for the Settlement Facility, submitted a letter on June 27, 2006 indicating that Ms. Perkins did not timely file an Opt-Out Form. (6/27/06 Austern Letter) Mr. Austern indicated that Ms. Perkins' original Claim Form Packet was mailed in early 2003 to her attorneys' last known address. The Packet was returned "undeliverable" by the United States Postal Service. On July 17, 2004, the Settlement Facility mailed to Ms. Perkins, at her last known address, a Class 5 Claim Packet and a Participation Form. The Packet was returned undeliverable in September 2004. Ms. Perkins thereafter called the Settlement Facility in February 2005 wherein she gave the Facility her new address. Later in June 2005, the Settlement Facility received a notice that the law firm of Feldman, Franded, Woodard, Farris and Boudreaux was representing Ms. Perkins. On July 28, 2005, the Settlement Facility received another notice advising the Facility that the firm was no longer representing Ms. Perkins. On September 13, 2005, Ms. Perkins provided the Settlement Facility with another address. Mr. Austern indicates that Ms. Perkins' current address in their records is different from the addresses noted on the Court's correspondences to Ms. Perkins. Mr. Austern indicates that, to date, Ms. Perkins has not filed a Claim Form with the Settlement Facility. (6/27/06 Letter)

The Litigation Facility, in response to Ms. Perkins' requests to opt-out, argues that because Ms. Perkins failed to complete a Participation Form, to

date, she is precluded from opting out of the Settlement Facility since the November 29, 2004 deadline is passed. The Packet was mailed to Ms. Perkins' last known address and her attorney's last known address. The Litigation Facility argues that she and her counsel had an obligation to keep the Settlement Facility apprised of her current address. Ms. Perkins did not contact the Settlement Facility until February 2005, which was after the November 29, 2004 deadline. The Litigation Facility claims that Ms. Perkins' request to opt-out should be denied.

In reply to Ms. Austern's letter and the Litigation Facility's response, Ms. Perkins admits that she has not filled out a Class 5 Claim Form and will not file the form. (7/13/06 Reply) She indicated that Karen Read, "Chair of the Dow Litigation Attorney", and Kathy Johnston, from Toxic Discovery, both told her not to fill out her Class 5 Claim Packet because Ms. Perkins was opting out and not staying in the Settlement Facility. Ms. Perkins seeks to opt-out from the Settlement Facility.

II. ANALYSIS

A. Plan Interpretation

The Court retains jurisdiction under the Amended Joint Plan of Reorganization ("Plan") "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of

a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, Art. 8.7.3 and Art. 8.7.8)

The Plan provides that each Personal Injury Claimant shall be afforded the option, "during the six-month period following the Effective Date, to elect to settle or to opt out of the settlement options under the Settlement Facility." (Plan, Art. 5.4) The Participation Form gives a Personal Injury Claimant the opportunity to elect to settle or litigate their Claims under the terms of the Settlement Facility Agreement or the Litigation Facility Agreement, as applicable. (Plan, Art. 1.123) The Settlement Fund and Distribution Agreement, Annex A, provides that Claimants have a right to elect to pursue litigation against the Litigation Facility instead of participating in the Settlement Program but "must affirmatively elect to litigate." (SFA, Annex A, Art. 3.02(a)) Personal Injury Claimants "must make their election by completing, signing and returning the Participation Form to the Claims Office on or before the six (6)-month anniversary of the Effective Date ("Election Deadline")." (SFA, Annex A, Art. 3.02(c)(i)) "Claimants who elect litigation must sign the Participation Form." (SFA, Annex A, Art. 3.02(c)(v)) "A Claimant whose Participation Form is rejected because it was not submitted by the Election Deadline may appeal to the Appeals Judge." (SFA, Annex A, Art. 3.02(c)) Because this matter has been brought to the Court's attention by the Claimant, the Court exercises its jurisdiction

under the Plan to interpret and enforce the Plan terms. (Plan, Art. 8.7.3 and Art. 8.7.8)

"In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *In re Dow Corning Corporation,* 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). "State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with parties' prior obligations." *Id.* "A term is deemed ambiguous when it is 'capable of more than one reasonable interpretation.'" *Id.* (citation omitted). The word "must" means that the requirement is mandatory and not discretionary. *Perotta v. Gregory,* 4 Misc.2d 769, 771, 158 N.Y.S.2d 221, 223 (N.Y. Sup. 1957); *Lazar v. Towne House Rest. Corp.*, 6 N.Y.S.2d 923, 924, 190 N.Y.S.D. 997 (N.Y. 1959).

The plain and ordinary meaning of the word "must" as set forth in Annex A of the Plan requiring Claimants to affirmatively elect to litigate and to sign the Participation Form is unambiguous. As noted above, the word "must" means the requirement is mandatory and is not discretionary. Under Annex A of the Plan, the Participation Form must be completed, signed and returned by the Election Deadline. Ms. Perkins, the Settlement Facility and the Litigation Facility all agree that Ms. Perkins never submitted a Claim Form nor a Participation Form. Nothing in the Plan or the Plan Documents allows the Settlement Facility or the Litigation Facility to allow a Claimant,

who has not submitted a Participation Form at all, to elect to litigate against the Litigation Facility after the November 29, 2004 Election Deadline. Only the Plan Proponents may jointly amend or modify the Plan. (Plan, Art. 11.4) The Plan Proponents' successors have not agreed in this case to modify the Plan or Plan Documents language to allow a Claimant to opt-out of the Settlement Facility without submitting a Participation Form beyond the November 29, 2004 Election Deadline.

B. Excusable Neglect

The next issue is whether Ms. Perkins' or her former counsel's failure to update the Settlement Facility with each of their current addresses constitutes "excusable neglect." The Supreme Court in addressing a late claim filed beyond the deadline set forth in Bankr. R. 3003 used the "excusable neglect" standard under Fed. R. Civ. P. Rule 60(b)(1) to determine whether the Bankruptcy Court had the authority to enlarge time limitations under Bankr. R. 9006(b), which is patterned after Fed. R. Civ. P. 6(b). The Supreme Court approved the following factors that a court may consider in finding excusable neglect: 1) the danger of prejudice to the debtor; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and, 4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). However, the

Supreme Court disapproved the allowance of a late claim based on the omissions of an attorney. *Id.* at 396. The Supreme Court noted that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396. A client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Id.* at 397. In assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *Id.* (emphasis in original). In applying the Supreme Court's analysis, the Sixth Circuit has noted that it may be excusable for a client to rely on the advice of counsel, however, action or inaction by counsel that leads to successful malpractice suits by the injured client do not qualify as a mistake or excusable neglect under Rule 60(b)(1) and that failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect. *McMurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 595 (6th Cir. 2002) (quotations and citations omitted).

In addressing the factors set forth by the Supreme Court, the Court finds that allowing this one claim to proceed against the Litigation Facility would not prejudice the Debtor. The Litigation Facility has

not provided any evidence that allowing Ms. Perkins' claim would affect the remaining funds to litigate claims against the Litigation Facility under the Plan. Allowing Ms. Perkins' claim will not further delay the administration of the Plan since the claims against the Litigation Facility are currently in the initial resolution, pre-discovery phase. Bad faith on behalf of Ms. Perkins has not been shown, given that it appears she and her initial counsel (when her claim was filed before the MDL) no longer communicated when the Claim Packets were mailed to them.

However, as to Ms. Perkins' failure to submit a timely Participation Form in order to properly opt-out from the Settlement Facility, the failure of Ms. Perkins or her initial counsel to verify the requirements of the Plan and the Plan Documents regarding the forms to submit and the deadline to submit the forms and the failure to update the Settlement Facility of Ms. Perkins and her initial counsel's addresses cannot constitute excusable neglect. The Settlement Facility mailed the forms to the addresses available to the Facility. Ms. Perkins and her initial counsel had the duty to update the Settlement Facility with their current addresses. Ms. Perkins had the knowledge on September 10, 2003 to request information from the then-Tort Claimants' Committee, after receiving the information from the Alexander Law Firm. It was not until February 2005, over a year later, that Ms. Perkins decided to contact the Settlement Facility. Ms. Perkins does not indicate how she learned of the Settlement Facility's telephone

number. Based on Ms. Perkins' letters, she had the opportunity to speak to various attorneys regarding her claim, including hiring a lawyer in June 2005. Ms. Perkins refers to the Alexander Law Firm in September 2003, Mr. Boudreaux in June 2005, Ms. Read in 2005 and Ms. Johnston of Toxic Discovery. There is no indication that Ms. Perkins or her initial counsel relied on misinformation provided by the Debtor or the Bankruptcy Court or the Settlement Facility prior to the November 29, 2004 Election Deadline. Although Ms. Perkins never received the Participation Form, it was not because she was intentionally deprived of receiving the Form. The Settlement Facility's records indicate the Packet was sent to her attorney of record and to Ms. Perkins herself but both were returned undeliverable. The Settlement Facility was not provided with the current addresses of both Ms. Perkins and her attorney of record. *See, e.g., In re Isaacman,* 26 F.3d 629, 636 (6th Cir.1994); *In re Halstead,* 158 B.R. 485, 487 (9th Cir. B.A.P. 1993), aff'd, 53 F.3d 253 (9th Cir.1995). Unless the action of the moving party has been delayed by an outside force, there will generally be no cause to apply equitable tolling principles. *In the Matter of Hambright,* 216 B.R. 781, 783 (W.D. Mich. 1997). Ms. Perkins' Claim must remain in the Settlement Program. However, Ms. Perkins must submit the appropriate forms to the Settlement Facility in order for her Claim to be processed. Ms. Perkins may refer to the Settlement Facility's website (www.sfdct.com) for further information and deadlines governing her Class 5 Claim.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Lou Anne Lavender Perkins' Motion/Appeal to File Notice of Intent **(Docket No. 1, filed June 9, 2006)** is DENIED and this matter is CLOSED.

IT IS FURTHER ORDERED that the Motion to Extend Deadline **(Docket No. 3, filed June 19, 2006)** is MOOT, Ms. Perkins having filed supplemental letters on June 26, 2006 and July 13, 2006.

S/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: March 31, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 31, 2007, by electronic and/or ordinary mail.

S/ William F. Lewis
Case Manager